UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF MARION LEVINE, DECEASED, ROBERT L. LARSON, PERSONAL REPRESENTATIVE AND TRUSTEE, ROBERT H. LEVINE, TRUSTEE AND NANCY S. SALITERMAN, TRUSTEE,	)	
Petitioner(s),	)	
v.	)	Docket No. 9345-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case was assigned to this division of the Court because it's related to one on the Court's June 15, 2015 St. Paul, Minnesota trial calendar. Respondent moved for leave to file a first amendment to his answer. He wants to add inadequate disclosure under IRC § 6501(c)(9) as a reply to petitioners' assertion of a statute-of-limitations defense. This may be important -- in his original answer, respondent had asserted a substantial omission under IRC § 6501(e) which extends the statute to six years, while inadequate disclosure extends the statute indefinitely. Petitioners objected, and argue that respondent wasn't diligent in asserting this ground and that it's inconsistent with the ground he's already asserted in his answer. But, Tax Court Rule 31(c) allows for alternative arguments. Petitioners also argue that it's prejudicial because petitioners had moved for summary judgment before respondent moved to amend his answer. The Court spoke with the parties on November 9.

Tax Court Rule 41 governs, but we also use caselaw under the parallel provision in the Federal Rules of Civil Procedure, FRCP 15(a). *Curr-Spec Partners, LP v. Commissioner,* 94 TCM 314, 317 (2007). It provides that when more than 30 days have passed after an answer has been served, "a party may

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amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires."

Whether a party may amend its answer lies within the sound discretion of the Court. *Quick v. Commissioner,* 110 T.C. 172, 178 (1998) (citations omitted). In determining the justice of allowing a proposed amendment, the Court must examine the particular circumstances of the case, and consider, among other factors, (a) whether an excuse for the delay exists; and (b) whether the opposing party would suffer unfair surprise, disadvantage, or prejudice. *Estate of Ravetti v. Commissioner,* 64 TCM 1476, 1478 (1992).

A. Delay

Respondent doesn't really address the issue of delay, but the Court notes that the delay hasn't been that prolonged. Respondent filed his answer in June of this year, then engaged in informal discovery, reached some stipulations with petitioners and only then moved to amend his answer. This is one of a pair of consolidated and complex cases with large deficiencies at stake. So, though there may be some delay, it's not much and seems largely excusable as deeper thinking about the case as it develops.

B. Prejudice

The Court can see no *unfair* surprise, disadvantage, or prejudice to petitioners. There may well be prejudice or disadvantage in the sense of having to counter a new argument that might be difficult to argue against. But to justify not allowing an amendment, prejudice must be unfair, which in this context doesn't mean lowering petitioners' probability of success but rather means lowering the probability of reaching a just result in the case. This usually means an amendment filed so late that trial would be delayed, *see, e.g., Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454-455 (8th Cir. 1998); *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 448 (8th Cir.1995), or the addition of a new theory of recovery, *see, e.g., Dover Elevator Co.*, 64 F.3d at 448; *Popoalii v. Correction Medical Services*, 512 F.3d 488, 497 (8th Cir. 2008). It doesn't include circumstances where a summary-judgment motion prompts the Commissioner to come up with a new argument. *Curr-Spec,* 94 TCM at 317-18.

And this case is quite close to *Curr-Spec.* There is no trial date, and the proposed amendment -- if not quite purely legal (there must be proof of the return

petitioners filed) -- isn't a gateway to a vast new program of discovery. It is therefore

ORDERED that respondent's October 26, 2015 motion for leave to file an amendment to his answer is granted and the Clerk shall file the amendment attached to the motion.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
November 19, 2015